IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

BRIGHAM YOUNG UNIVERSITY, a Utah Non-Profit Education Institution; and DR. DANIEL L. SIMMONS, an individual,

Plaintiffs,

vs.

PFIZER, INC., a Delaware corporation; G.D. SEARLE & COMPANY, a Delaware corporation; G.D. SEARLE LLC, a Delaware limited liability company, MONSANTO COMPANY, a Delaware corporation; and PHARMACIA CORPORATION, a Delaware corporation,

Defendants.

Case No. 2:06-CV-890TS

BEFORE THE HONORABLE TED STEWART

February 10, 2011

Motion Hearing

REPORTED BY: Patti Walker, CSR, RPR, CP

350 South Main Street, #146, Salt Lake City, Utah 84101

A P P E A R A N C E S

For Plaintiff:

Adam Anderson
Leo Beus
Richard Williams
BEUS GILBERT
4800 N. Scottsdale, #6000
Scottsdale, Arizona 85251

Mark Bettilyon
RAY QUINNEY & NEBEKER
36 South State Street, #1400
Salt Lake City, Utah 84111

Robert Blakey
UNIVERSITY of NOTRE DAME LAW SCHOOL
P.O. Box 780
Notre Dame, Indiana 46556

For Defendant;

John Dougherty
DLA PIPER US
6225 Smith Avenue
Baltimore, Maryland 21209

Richard Mulloy
DLA PIPER US
401 B Street, #1700
San Diego, California 92101

Brent Hatch
HATCH JAMES & DODGE
10 West Broadway, #400
Salt Lake City, Utah 84101

SALT LAKE CITY, UTAH; THURSDAY, FEBRUARY 10, 2011; 3:00 P.M.

PROCEEDINGS

THE COURT: Good afternoon, counsel. We are here in the case of Brigham Young University, et al., plaintiffs, vs. Pfizer, Inc., et al., defendants, case 06-CV-890. We have representing the plaintiffs in this case Mr. Adam Anderson, Leo Beus, Robert Blakey, Mark Bettilyon and Richard Williams, on behalf of defendant Pfizer, John Dougherty, Rick Mulloy, and Brent Hatch.

Counsel, let me make you aware that we have one hour for this hearing. This matter has been very thoroughly briefed and the Court believes that it has a fairly good handle on most of your arguments. I'm therefore going to ask that you focus exclusively in the motion to dismiss on the RICO enterprise issue and on the motion for summary judgment, the fraudulent concealment.

And these are your motions, Mr. Hatch. Who will be arguing them?

MR. DOUGHERTY: Your Honor, John Dougherty.

MR. HATCH: Your Honor, he'll argue --

THE COURT: You'll split them.

MR. HATCH: Yeah, we'll split those two issues.

THE COURT: All right. Let me tell you what I'm going to do then, counsel. I will give you 25 minutes, and then you split that however you want. And then I will give

the other side a half hour. Then you will get the last five minutes. Okay.

Be aware that we do have a jury out in a criminal case. If the Court gets a note that it has reached a verdict, we'll have to take that verdict unless it's close enough to the end that we can just wait for the attorneys to appear before we do it. But it is a priority, which you can appreciate.

MR. HATCH: How long has the jury been out, Your Honor?

THE COURT: Just a couple of hours, but it's only been a two-day trial.

Mr. Dougherty, will you handling the RICO enterprise issue?

MR. DOUGHERTY: I was going to the statute of limitations, if that's okay.

THE COURT: That's fine.

MR. DOUGHERTY: We have some slides, Your Honor, and I see they are now up here.

So the Court has indicated an interest in discussing the fraudulent concealment issue. And, of course, this would be part of the statute of limitations discovery rule jurisprudence. And I think the Colosimo case, Your Honor, is very helpful for us understanding the burden that the plaintiff bears on the fraudulent

concealment. So there really are two questions under the fraudulent concealment law as it exists in Utah, and the question is did the plaintiff exercise reasonableness and diligence and was the concealment so entire that there is no way that somebody could be put on notice, or did the plaintiff make an inquiry and be misled by the defendant. I think those are the teachings of both Colosimo and the Russell Packard case.

And I think in this case, Your Honor, there are only a few facts that are largely undisputed, in fact, can't really be disputed, that bear directly on the question of whether or not the plaintiffs in this case knew enough to be on inquiry notice because there is no dispute that no inquiry was made. So I think we're in that prong of fraudulent concealment that asks the question was the cause of action so entirely concealed from the defendants that no inquiry would have been possible or would have been futile.

We think both with respect to the wrongful termination allegations, Your Honor, and the misappropriation of the project allegations, the record evidence is undisputed and these plaintiffs knew or should have known and were on notice that if they had a claim, they should have pursued it. They should have picked up the phone and made a call, wrote a letter, asked a question. They never did it.

Between the termination of that agreement in March of 1992 and the time they contacted the defendants in 1999, there was absolutely no inquiry made of the defendants. There were a couple of contacts. Your Honor, I would like to focus on the facts that I think are relevant to this question.

The wrongful termination allegations which form the basis of so many of the causes of action, but we find it here on the screen, Your Honor, in the breach of contract, Count 1, the essential allegation is that the research agreement that the parties executed in March -- or effective August of 1991 was wrongfully terminated in March of 1992.

So we're going to take a look at our time line here. And, quickly, Rick, I would like to go through these.

Your Honor, all this is all in the briefs, but basically what happened here was Monsanto -- the lead Monsanto scientists wrote Dr. Simmons in March of 1992 and provided the reasons that he believed that the contract should come to an end. Remember, Your Honor, this is a two-year contract, $50,000 in grant money per year. So this would have been a premature termination of the agreement on its own terms.

So Dr. Needleman informed the plaintiffs of this. The agreement was terminated. And Dr. Simmons hotly disputed that termination. So for the purposes of the

statute of limitations, Your Honor, we know that the contract claim has to -- it's six years. We know that the tolling agreement was executed in May of 2001. So the question Your Honor has to ask, particularly as focused on the fraudulent concealment, what did the plaintiffs know prior to May of 1995 with respect to the termination of the agreement and whether or not it was wrongful.

They knew the agreement was terminated for sure. We also know that Dr. Simmons wrote a letter to Dr. Needleman disputing the ground of the termination.

This is from the plaintiffs' complaint. And here it's very clear, plaintiffs' own words, Your Honor, this is the way they have framed the case. He is arguing that the termination was in error. He believes that Dr. Needleman did not have complete or accurate information. He went to a conference and confronted -- confronted Monsanto in July of 1992, according to the complaint, Your Honor. He engineered a luncheon with the Monsanto scientists to dispute the termination, to try and get the research agreement reinstated. And he apparently was pretty hot in his description of why he thought it was wrong to terminate the contract. In fact, the conversation was so hot -- again, this is all from the plaintiffs' complaint -- that Dr. Needleman turned around and said, I'm not dishonest.

THE COURT: Mr. Dougherty, let me ask you this. I

understand you have argued that he felt wronged by it. The plaintiffs here argue that that feeling of wrongfulness is not enough to have put him on notice that your client, in fact, had a secret, conspiratorial intent in all this. So you've got to get me from his feeling wronged, feeling like it was a mistake, et cetera, to understanding what they are alleging you, in fact, terminated it for.

MR. DOUGHERTY: Right. So our reasons for the termination, Your Honor, are completely irrelevant to the statute of limitations question. The only question that has to be asked is was the contract breached, did the plaintiff know, were the plaintiffs in possession of enough facts for them to file a cause of action, were they in possession of enough facts to make an additional inquiry of the defendants. They did none of that. I think these facts show -- it is one thing to say now in the face of this motion, well, he didn't really like the fact it was terminated.

But, Your Honor, if I'm sitting in private practice and somebody walks into my office and says I had a two-year agreement and these guys terminated it, and I was depending on that $50,000 next year, and the reasons they gave for the termination, whether or not there is some conspiracy behind it or not, are irrelevant. The question is what did he believe. He believed that the termination

was wrongful. He went into exquisite detail as to why he thought the termination was wrongful.

If a client walked into my office and laid those facts out in front of me and said I went and confronted these guys in Montreal and they refused to reinstate the contract, and, apparently, according to plaintiffs' own internal memorandum, he was telling other faculty members that the termination was unjust, wrongful, unjust, upset, frustrated, if a client walked into my office and gave me those facts, I don't believe that there is a lawyer in this room that wouldn't say to that client the statute of limitations is running. You now know enough to either bring a cause of action or to write a letter complaining about it. Plaintiffs did none of that. After the confrontation in Montreal, it was radio silence from the plaintiffs.

What else do they know at the time? They know that they had a second year of the agreement. They know they were waiting for another $50,000. They know that Monsanto has possession of all of this information that plaintiffs now claim is a trade secret and confidential information, and that we were not permitted to use, we were not permitted to do any further research on COX-2 without Dr. Simmons' involvement.

All of this is known by May of 1993. There is no question that the plaintiffs believed the contract had been

breached, that they were entitled to have that contract reinstated, that they were entitled to their additional money, they were entitled to whatever rights that they have asserted in that first amended complaint.

So when the plaintiffs try and focus the question of accrual not on what they knew and not on the precise question of injury and first harm, which were clearly present right after that termination, and they want to make it about what the defendants' motivations were, what the defendants knew, we've turned the statute of limitations analysis upside down. The statute of limitations is only concerned about when the plaintiff could have acted.

These facts, all undisputed, show that the plaintiffs could have acted and did not. They waited. They waited until Celebrex had been launched and had become a billion dollar drug before they did anything. That delay, Your Honor, has significant consequences not just for their claims but for us as well, because in that period between 1992 and 1999, hundreds of Monsanto employees were bringing COX-2 therapies to the markets. Hundreds of millions of dollars were being spent. Documents which existed were being recycled. Witnesses, critical to this case, are dying. So that delay has consequences not just for the viability of their claims but for our ability to defend this lawsuit.

So when it comes to concealment, Your Honor, the concealment of the facts that they want to focus on is not the concealment that the law is asking the Court to look at, which is was the plaintiff denied the ability to know that he had a claim. We believe these facts show that without any reservation at all.

Your Honor, if I could go to the fraudulent concealment as it relates to the other claims and quickly review those facts with you.

So the misappropriation argument, Your Honor, allegations that exist throughout the first amended complaint, it's basically the notion that defendants stole the so-called project. And the project is defined by the plaintiffs. This is not our definition. This is theirs. The project itself was a trade secret. And the project they define as being the search for COX-2 selective inhibitors and further research on the COX-2 enzyme without Dr. Simmons' direction or involvement.

So the question is if that is the misappropriation of the project, when did plaintiffs know or when should they have known. Just to give them the benefit of the discovery rule for a second, when should they have known that that claim existed. I think we've shown in our brief and we can quickly go through it now, Your Honor, we cited to you some of the articles of Monsanto. I would note for Your Honor

that Drs. Masferrer and Seibert, the two authors on these articles, are the very same people that Dr. Simmons alleges he had the most extensive contact with at Monsanto.

So throughout 1994, we, meaning the defendants, are publishing articles that clearly reveal that we are continuing COX-2 research, that we are in the hunt for COX-2 selective inhibitors. We know that the plaintiffs understood that because they are citing those exact same articles in their research grants.

Can we pull up the first research grant from 1994?

Here is Dr. Simmons applying for a research grant at NIH. In here he's disclosing the basic hypothesis of COX-2, and he's talking about it eliciting intense interest from the pharmaceutical industry. He's also going on to say that the finding of these would be of tremendous value, enormous importance to those suffering. He's citing the Masferrer article in 40. He is reading what we're publishing. He knows that we're continuing COX research without him. He knows that we are looking for and found COX-2 selective inhibitors. All of this, Your Honor, well before the statute of limitations would be saved by the tolling agreement, well before.

So if the question is -- because I understand the plaintiffs are going to come up and they are going to talk about some conspiracy to conceal. This is exactly the

opposite. This is a pharmaceutical company doing what pharmaceutical companies do. They publish the results of their research.

Rick, let's go to the next slide.

Here is an article in December of 1994 -- yes, 1994. This is in a very prestigious journal, Your Honor, Proceedings of the National Academy of Sciences. In here, Monsanto scientists are again disclosing this notion that COX-2 selective inhibitors could be the breakthrough that would alleviate suffering, people taking NSAIDs, and all those side effects. In this article we're making specific reference to our own compound, the SC-58125. This is a COX-2 selective inhibitor.

So if the project as defined by the plaintiffs is that we, meaning the plaintiffs, own the right exclusively to pursue COX-2 selective inhibitors and you are not permitted to do that without our involvement, this article and the other article and the other articles that are in this presentation, Your Honor, show again and again and again not only that we're publicly disclosing it, but that plaintiffs know.

Rick, let's go to the next slide.

Again, Your Honor, we're just kind of going through here, recognizing the limitations on our time. Here is a chapter from -- a book chapter Dr. Simmons wrote in

1996 where here he's talking about extensive drug screening by the pharmaceutical industry has led to the identification of multiple potential COX-2 selective inhibitors, and among the articles that he cites is an article by Monsanto where that very fact is disclosed.

The next, please. Go through these quickly.

In fact, Dr. Simmons was reading so carefully the articles that were disclosed in all the work that the defendants were doing in the COX-2 world, that he had one of his colleagues in January of 1996 write us a letter asking us to send him a sample of that very same SC-58125 that was disclosed in that prior article.

So as we go through these facts, Your Honor, the question here is did he know or should he have known, did he know enough to write a letter to ask defendants are you using my stuff, why are you continuing the COX-2 research, why are you continuing the project, hold on a second, you're not allowed to do that under my -- nothing, nothing at all until we had a blockbuster drug on our hands.

Rick, go to the next slide, please.

Dr. Simmons' interest in COX-2 was well known throughout the BYU community. In May of 1996, Your Honor, Lynn Astle, who was I believe the head of BYU's technology transfer office -- so that's going to be the office that deals with the questions of patents and licenses and all

that stuff. He is sending Dr. Simmons an article that appeared in another journal. This one, The Wall Street Journal, so a little more widely read. But here, what does this article reveal? It reveals that the COX-2s may be the holy grail. It reveals that Monsanto, along with Merck, are the first ones to specifically design COX-2 selective inhibitors. It also tells him that we are entering into human clinic trials, the second of the last stage of getting something to the market. He even knows what the name of the drug is because it's right there in the article.

Next, please.

In October of that same year, again, Dr. Simmons is, in a grant application, reporting that proprietary COX-2 drugs have been discovered by the pharmaceutical industry. Again, he's citing to, this time, two Monsanto articles.

Next, Rick. Keep going.

So, Your Honor, all of the misappropriation of the project allegations are contained in nearly every single -- I believe every single count in the complaint. So the question, for purposes of statute of limitations, is when did plaintiffs know that the project had been misappropriated.

We believe that they knew the day after termination because there was no reasonable position that Dr. Simmons could take to say he thought we were going to

stop. When the agreement was terminated, there was never a request for return of the materials. There was never any communication where Dr. Simmons said you can't do COX-2 research anymore. Then July, that conference where he confronted them, that was a conference that related to the very subject he said we weren't allowed to do research on.

By the time it hits The Wall Street Journal in May of 1996, there is simply no doubt in the minds of the plaintiffs -- forget about what the defendants knew, no doubt in the minds of the plaintiffs that they had possession of all the information that they needed to pick up the phone and call, or to file a lawsuit, and they didn't do any of it. Why? I don't want to speculate about why. But is the timing of this coincident with Celebrex's first blockbuster year? That's the first time they contacted us, when any harm that occurred to the plaintiffs in 1992 could have been addressed and remedied. That's what the statute of limitations is all about. We want you to file this case as soon as you know you've got a claim on your hands because we don't want it to turn into something else.

That's exactly what happened here. So instead of dealing with the simple breach of contract, this case has morphed into now we're talking about RICO allegations. Fraudulent concealment? Hardly. Defendants were putting out there in the public domain exactly what they were doing,

not everything, but enough for these plaintiffs to know that the project that they claim was misappropriated was well under way at Monsanto and was leading to a successful COX-2 selective inhibitor program. That's not concealment. If anything, that put them on notice to do something. I think it gave them actual knowledge. I believe it gave them enough to pick up the phone, write a letter, make an inquiry. Never happened. Never happened.

Plaintiff is not allowed to sit and wait until he or she believes they have been harmed enough. They have to move. The first injury, the first harm, that's what the law teaches us, and that's not what happened here.

THE COURT: Thank you, Mr. Dougherty.

Mr. Hatch, you've had 20 minutes to --

MR. HATCH: Twenty minutes?

THE COURT: No. You've had 20 minutes -- 25 minutes, roughly, to get your thoughts. Summarize your arguments in about seven minutes, okay.

MR. HATCH: You had me all excited.

MR. DOUGHERTY: Your Honor, before you begin, I'm wondering whether I could hand you up a time line that kind of summarizes the facts that I just --

THE COURT: Sure, that would be helpful.

MR. DOUGHERTY: Maybe mark this as Defendant's Exhibit Hearing 1-A.

MR. HATCH: I did a quick bunch of cut and pasting, Your Honor.

You asked me to address the enterprise as part of our RICO argument, and I will do that. As Your Honor is aware, the cases require that an enterprise must have at least two attributes. One is a common purpose and the second is relationships among those associated with the alleged enterprise.

Now the first question -- if you will go to the next -- that's fine, yeah.

The complaint takes an interesting approach here because, as we've argued in our briefs and I would argue again today, if you look at the allegations, particularly when you go to pattern of racketeering activity and the other aspects of this matter, we're in a position now of a case that -- the contract had started in 1991. It went for a few months. Terminated in '92. Tolling agreement in 2001. A lawsuit is not until 2006. Still, not until last year, late 2010, we finally have an amended complaint asserting RICO claims.

And virtually every allegation, if you look at them closely, misapprehends not only all the elements of what is required to establish a RICO claim, but really talk about garden-variety business disputes, business torts, contract disputes, things of that nature.

So to be able to fit this kind of square peg in a round hole, as the cases have said, to establish an enterprise, the plaintiffs here have to start with a purpose. The purpose the plaintiffs chose to start with is paragraph 192, define one of the -- it says, the enterprise was formed for the purpose of developing and marketing a COX-2 selective nonsteroidal anti-inflammatory drug.

Well, let's think about that for a minute because if you read the rest of the complaint, and when they talk about the pattern of racketeering activity, when they talk about what is actually at issue here, it really isn't this broad. What they are asking for, they are saying that what we did, allegedly, was misappropriate the confidential information of the plaintiffs.

The problem with that, if you identify the purpose directly, is that gives you, almost by the definition of it in the facts of this case, a single actor, a single target, and a single event, because misappropriation -- as we said in our briefs, misappropriation of a trade secret can only happen once. Once it's taken, it's taken, including all of its value. So with that, they have no ability to really establish an enterprise.

So then what do you do? You look and find a way, maybe we can expand this. They expand the purpose to this, developing and marketing, something that is not even -- is

not even an inappropriate in and of itself purpose. And you can see pretty quickly by expanding the breadth of what this purpose is does, because it literally brings in almost anybody who could possibly ever touch this drug.

You've got clinical trial participants. They are helping develop. Drug reps, radio stations, TV stations, newspapers, magazines, all part of, theoretically, the marketing. If you take this broad approach that the plaintiffs have taken here, doctors helping develop and marketing it through samples and other things, it gets really quite absurd. They didn't bring these in. They would fit underneath their definition, but they brought in eight particular entities. And there are problems with each of those as well.

You can go to the next slide.

Washington University, UCLA, the Proceedings of the National Academy of Sciences, an advertising firm, two law firms. Now for these people to really create the enterprise, there has to be two things. There has to be this purpose. And I think if we look at it as what the actual purpose allegedly is, which is a misappropriation of the confidential information of the plaintiffs here, there is not an allegation anywhere in the complaint that any one of those alleged members of the enterprise had or could have had that as a purpose. It's not alleged in the complaint.

And that's fatal to their RICO claim.

I would put to the Court that what we look at too is not trying to conflate things here and look at it through what was potentially Monsanto's purpose, but what was the purpose of each of these purported members of the enterprise. I think once we look at that, the purpose can't have been the purpose either as they define it or as it would have appropriately been defined.

Then the second aspect of that is the relationship with others. Well, the case law talks about that, and there are no allegations that any of these particular members of the enterprise are related in the way that is implied. We have cited -- both sides have cited the U.S. v. Feldman case at 853 F.2d 648. In that case it talks about an organization. It talks about continuity. There aren't any allegations in the complaint that talk about how any one of these particular and alleged members of the enterprise are part of any kind an organization, how they have any continuity, as a matter of fact, how they have any relationship between themselves at all.

A perfect example, I can just pick one out, is UCLA. They claim that a professor at UCLA gave Monsanto his COX-2.

Well, the interesting thing about that is, as you go down, what's the relationship with Sidley Austin, which

is serving as a lawyer. In our brief it talks about how that's not enough anyway. Even if it were, 15 years later a lawyer comes in and allegedly has discovery disputes with them. What's the common purpose, what's the organization, what's the continuity there from this one-time event to a professor at UCLA down to Sidley Austin that's representing the firm in litigation? That's what is missing here, Your Honor.

The kind of thing you would expect to see is the kind of thing we would see like in a case like U.S. v. Jones in the Second Circuit, 482 F.3d 60. At page 70, it talks about there are two executives. They were known as LT and Speedy. It seems like there always ought to be some cute name here. It ought to be something -- the something ought to be in their name. They had intent. They worked eight-hour shifts and were paid $500 for each shift. The lieutenants supervised four or five sellers and earned 20-percent commission on any sales. The executives packaged and prepared drugs, delivered to the lieutenants, delivered to the sellers, who then fraudulently sold those to individuals on the street. The sellers took their 20 percent. They gave 80 percent to the lieutenants, who then passed 20 up to the executives. They used violence to protect the sellers, their product, and their territory.

Here was a classic example of an organization

where people had a common purpose and were joined together in accomplishing it. There are no allegations in the complaint. Now we're only at the summary judgment stage, I understand, but there is an obligation for them to get those elements, and they have not done that here.

Yes, Your Honor?

THE COURT: One minute.

MR. HATCH: Oh, one minute. You don't want to ask a question?

THE COURT: No.

MR. HATCH: Let me just -- I will just quickly end then.

Just last year in the Third Circuit, in McCullough v. Zimmer, 382 Fed.Appx. 225, pages 231, 232, it's more like what is happening here, the exact opposite of U.S. v. Jones where it really was an organization and a common purpose. There the court had doctors who were allegedly involved in a scheme --

THE COURT: Is this a case cited in your memo?

MR. HATCH: It is not.

THE COURT: I didn't think so.

MR. HATCH: That's why I gave the cite. I apologize. We did do some preparation for the hearing. We found two things we had missed before. But I like this case because it was involving doctors who were acting parallel.

They were all getting money from a scheme, but they were acting parallel. They did not create an organization. They didn't have -- they didn't have a relationship among each other, just kind of like where they don't have here. And the Court said, nothing plausibly suggests that these parties combined as a unit with any semblance of an organizational framework -- same thing as here -- or a common purpose -- same thing as here -- nor have plaintiffs alleged facts that would support an inference that this alleged enterprise had any structure or existence separate and apart from defendants' alleged criminal conduct.

In other words, it's the exact same thing as here. The only thing, when it comes right down to it, that's alleged here is the alleged misappropriation by Monsanto. That didn't involve these folks, they weren't involved in that purpose, and they weren't part of an enterprise to do that. Thank you, Your Honor.

THE COURT: Thank you, Mr. Hatch.

Mr. Blakey, will you be handling all of the argument?

MR. BEUS: I'm Mr. Beus.

THE COURT: I'm sorry, Mr. Beus. I got these mixed up on my chart.

Will you be handling the argument on both issues?

MR. BEUS: I will not.

THE COURT: You will be handling the motion for summary judgment?

MR. BEUS: On the statute of limitations.

THE COURT: Thank you.

MR. BEUS: Your Honor, I have a time line to pass up for you and your clerk, if I may.

THE COURT: Yes, please, that would be helpful.

MR. BEUS: While he's doing that, let me first focus on the --

THE COURT: If you are putting that up for me to see, you are going to have trouble unless -- that's all right. If you have something that I can be looking at so I don't have to be looking over my shoulder.

MR. BETTILYON: Do you want me to turn this board?

THE COURT: No. I'm fine, Mr. Bettilyon.

Go ahead.

MR. BEUS: In order for defendants to make the argument they make, they have to restructure our entire complaint. If you look at our board, we don't complain about them doing a COX-2 project. We don't ask for $50,000 on the termination of the second half of the year. Our complaint is that they didn't tell us that they were using our materials to develop a COX-2 selective inhibitor. They didn't tell us that they had a completely different project going down the road. This changed everything, and they

didn't tell us, if you look at the time line there in front of you, if you look at the insert there, that they had an invention. Before they had terminated, they actually had a COX-2 selective inhibitor, that they had used our materials to invent on March 18, 1992, five days before they terminated.

Now, Your Honor, the relationship between these two parties is important. It was a fiduciary relationship. That relationship of a fiduciary character was set up in the contract. And Phil Needleman, their chief witness, admits that it's a fiduciary relationship. Let me show you his quote.

423, please.

The question, is it fair to say that Monsanto would do what you just described -- which means they are going to select the patent, pick the patent lawyer, tell us what is patentable, all spelled out in the contract -- is it fair for you to believe that BYU and Dan Simmons could repose trust and confidence in Monsanto? Answer: That's the intent. The intent of the parties here is to create a fiduciary relationship where they are going to do things and then tell us about them. Question -- even their head man on this -- and you don't think it would be unreasonable, do you, for Dr. Simmons to repose trust and confidence in that promise, do you? I don't think it would be unreasonable.

That's the relationship.

If you start with that relationship, let's go to the law on what that means.

Put up 456 for me, please.

A fiduciary's breach of the duty to speak the truth is sufficient to establish fraudulent concealment. Undone. What we have no dispute about as to the facts is that when they terminated this contract that's laid out on our time line, they didn't tell us any of these things.

What did they do? They complained that we didn't give them the best bleed. They complained that we didn't tell them about dexamethasone, or give them some cells. They didn't once tell us that they had a COX-2 project, that they were using our antibodies, that they were using our clones, and they had in hand a molecule, that they had developed over just a short period of time after using our materials, that was a COX-2 selective inhibitor. They had a duty to tell us that, and under the contract, that duty was clear and unambiguous.

Now let's take a look at the contract itself.

419, if you would, please.

Here's some of the obligations they have. By the way, these obligations about a reasonable royalty, we don't need a tolling agreement, we don't need fraudulent concealment, we don't need anything. Let me show you what

the contract says there. It's on the bottom of the slide, paragraph 3.4. University agrees to negotiate in good faith with Monsanto the terms and conditions of a royalty-bearing license agreement with a right to sublicense with respect to patented inventions developed in the project.

They never told us they had developed anything in the project. We had no misunderstanding that they were going to go do COX research. That's why that collaboration started. What they didn't tell us is it was our materials when they did that, and that's what our complaint is about.

Then it says, such negotiations shall be completed within one year after the issuance of a patent. On the screen, there is no dispute about these facts. You will see the very first COX-2 inhibitor issues 6 September '95. You add one year. That gets you to 6 September '95. We're tolled on May 8th, 2001. That's within six years. I don't need anything on that.

403.

Their lawyer, their in-house lawyer -- would you take the arrow away, please.

THE CLERK: He can't.

MR. BEUS: Oh, I'm sorry.

Thank you.

Their lawyer, their in-house lawyer who drafted this document, and it is their document, I asked -- or

Mr. Williams asked, you included that language in this agreement that there are some things that could occur outside the two-year period? He says yes. And obtaining a patent would be more than two years.

Put up 436.

Here's some other ongoing obligations that don't cease with the contract and don't cease with the termination. They have a duty to notify us that research results obtained from the projects are patentable. They have never once said that, nor have they given us any kind of report. They have always denied, your stuff doesn't work, your clones don't work, your antibodies don't work. They have an obligation to get a royalty-bearing license agreement, which I showed you before. They have the right to designate a patent attorney. They have to bear the cost for that. We're entitled to know who the patent attorney is. They never told us that. They fraudulently concealed that when they had a fiduciary duty to speak. That ship has sailed.

Let me show you a United States Supreme Court case, and I've got a lot more.

Put up 435.

435, Franconia, the time of accrual depends on whether the injured party chooses to treat the repudiation as a present breach. The statute of limitations commences

to run from the time fixed for performance. As Professor Corbin explained, it's hornbook law, the plaintiff should not be penalized for leaving to the defendant an opportunity to retract his wrongful repudiation.

272. Actually go to 273.

Here's what it says, for each partial breach, each time they didn't tell us they had a patentable product coming out of the project with the use of our intellectual property, they had a duty. Each of those is a separate breach. Each of those breaches start yet another statute of limitations under the law.

Now let me go directly, a little bit more carefully, into inquiry notice.

Put up 420, would you, please.

Where the circumstances suggest to a person of ordinary intelligence the probability that he has been defrauded, the duty of inquiry arises. Dan Simmons didn't believe for a second that he had been defrauded. He thought he had been pushed around a little bit, and he felt bad. He didn't even have a suspicion that they had a COX-2 selective inhibitor. And for counsel to stand at this podium and say we didn't make any inquiry, just take a look at the time line in front of you. We wrote letters. We got no response. We wrote more letters. We got no response.

Dan Simmons cornered him in July of 1992, and it

was absolute denial. You know, you were not a good collaborator. You didn't give me the cells you needed. You didn't give me the other things you needed. We couldn't even get a dialogue going. But it didn't end there, Your Honor.

There were another seven or eight conversations with a man by the name of Barry Haymore who came to BYU -- a BYU alumni who came to BYU and got Dan Simmons to actually go talk to these folks, and that's how the collaboration began. He kept asking him, and he said, Dan, you don't know what was going on at Monsanto before you came along. That's fraudulent concealment. He has no idea.

But there are 12 to 14 communications, with stonewall, stonewall, stonewall. It's laughable to say we could have filed a lawsuit. There isn't a lawyer in the country with the information Dan Simmons had or could get, and when we did write letters, as you know from the briefings, it was denial, denial, denial. There is nothing more one could have done.

Now 458, if you would put that up.

The question of when a plaintiff reasonably would have discovered the facts underlying a cause of action in light of the defendants' affirmative concealment -- which the fiduciary relationship creates. Without any more argument, I'm going to talk about the articles in a

minute -- is a highly fact-dependent legal question that is necessarily a matter left to trial courts and finders of fact.

Would a reasonable person -- would Dan Simmons, having been confronted by Dr. Needleman saying your stuff didn't work very well? This is all new stuff. This intellectual property, the clones, the antibodies, they are just being created. Once the world knew that happened, the whole world came after COX.

Let me take just two or three minutes on the question of the articles because that's the big thing they make in their brief. Let me show you their brief.

Would you put up 452, please.

This is their statement of facts. Dr. Simmons testified that learning from Merck that Monsanto had used mouse COX-1 and mouse COX-2 raised questions --

THE COURT: Mr. Beus, remember, we have a court reporter. I know you're in a hurry, but read slowly enough that she can capture what you are saying.

MR. BEUS: I apologize, Your Honor. I get busted for that every once in a while. I stand corrected.

Here's what they did -- and they left this out -- in the way that I have already testified, and that brought up questions. They argue in their brief that, gosh, Your Honor, when somebody says mouse COX-1 or mouse COX-2, that

should tell Dan Simmons, man, they are using our stuff because I delivered you antibodies and clones for mouse COX-1 and mouse COX-2.

Then look what they argue. This is right out of their brief. Dr. Simmons testified that learning in the summer of '98 -- that's when he got hired by Merck and the truth starts to come out. That's why there was a delay -- that Monsanto had used mouse COX materials immediately raised suspicions. That's not what he testified to, Your Honor. That, candidly, is not correctly stated in the statement of facts or the brief, and it's not the testimony, and I want to take a minute to show you.

282.

This is the testimony. I had information that Searle/Monsanto had used mouse COX-1 and COX-2 in the way that I have already testified. That's at page 77 of his deposition. Now let me go 11 pages earlier where he references the way I have already testified.

285.

This is the testimony, and they told me -- the they is referring to Merck. Merck hired Dan Simmons because by now Dan Simmons is a recognized world expert on prostaglandins and selective inhibitors. And they are hiring him -- this is the summer of '98. This is what gives Dan Simmons, if one is to argue about inquiry notice, the

first inquiry notice that happens. He doesn't have any before. Notwithstanding not having inquiry notice, he kept after them, 12 to 14, 15 times, face-to-face and in letters. All denials, denials, denials.

13 minutes is up, so I will do this quickly.

THE COURT: You will have a total of 35 minutes, because I gave plaintiffs 30 minutes. I'm going to give them five minutes at the end, so I'm being terribly merciful.

MR. BEUS: Thank you very much, Your Honor.

Here's what is shown in the testimony that they leave out of their brief. The word patents, the drug developments starting with mouse and going to humans. That raised some questions. That's the first time he gets an inkling that they did drug development, which is what they were going to do under the project, use Dan Simmons' materials to do drug development. This, he now says, because when you get into the drug development and the literature, they are using human COX-1 and human COX-2, which he didn't even have at that early point in time. When he sees now that it goes from mouse to humans, that raises some questions.

Now the notion of mouse. You saw a bunch of articles. You read a bunch of articles. Let me just show you 361. The man here, I've highlighted at the bottom

there, is DeWitt. He was then at the time a professor at Michigan State. He's now at the University of Michigan, for which I'm grateful. He published in 1993, before all of the articles that deal with mouse COX-1, except the dexamethasone article didn't have anything to put anybody on notice, he published in '93 that murine PGHS-1 -- that's the same as COX, it's just a chemical term for it -- and PGHS-2 were expressed individually in cos-1 cells as described previously. Then it says, which the murine PGHS-1 cDNA was subcloned.

This is an independent investigator by 1993 who has the notion that mouse would alert anything to anybody. The whole scientific world pounced on this. The whole world knew about mouse COX-1 and COX-2. The notion that mouse COX-1 puts anybody on notice is silly.

Now there is an attribution in one of the articles, and I want to deal with that.

Would you put up 324.

This is a red herring. Here -- and by the way, there is a promise that if you are going to use any of Dan Simmons' materials, the contract says you've got to tell him in advance that you are going to do that. They didn't do that. That's part of their fiduciary duty. That's fraudulent concealment in and of itself.

This article in 1994 does, in fact, thank

Dr. Daniel Simmons for the COX-1 probe. There is a whole story behind that. Let me tell it briefly.

218, please.

Weilin Xie, the postdoc in Dr. Simmons' lab, after he finished that postdoc, tried to go to Monsanto, Pfizer. This guy was a world-class postdoc. They don't want anything to do with him because he would then know -- he would absolutely know that they are using his clones and antibodies. He can't get a job there. You heard counsel saying they were spending millions and millions. All they had to do is get Weilin Xie. They would have had the second best man in the world, second only to Dan Simmons on this.

So he goes to Dr. Harvey Herschman's lab, which is another source later for COX-2. Never a source for COX-1. And they then called and asked Dan Simmons if they could use one of his probes. There you see Dr. Xie's testimony, got permission, did it. That doesn't put anybody on notice.

342.

I shared this trade secret reagent with restrictions. Once you share something with anybody, there is no possible way that you would think that would cause you to believe that somebody is using it. He also knew that the CHOb probe was unique to Harvey Herschman. And it doesn't matter, but it didn't put anybody on notice. And it is a question of fact. But if he is imposed with a duty of

inquiry notice, he certainly did it.

Your Honor, I have one other hand-up that I wanted to talk about, but I don't want to eat up all of my colleague's time, so let me, if I may, pass up why a fraudulent concealment would be excused because of futility. They have been fraudulently concealing even as we stand here today. May I do this?

THE COURT: Yes, please.

MR. BEUS: Thank you very much, Your Honor.

THE COURT: Thank you, Mr. Beus.

MR. BLAKEY: May I approach, Your Honor?

THE COURT: You may.

MR. BLAKEY: Your Honor, I understand that you want to spend some time on the concept of enterprise. I think maybe the best way I can do that is to tell you how it got put together shortly, and then I think you will understand, as many people have not, how it operates within the context of the statute.

I was working for Senator John McClellan, democrat, of Arkansas. He had just had a set of hearings on the mob. He put in a bill that prohibited membership in the mob or a similar organization. The ranking minority member on my committee was Senator Hruska, a republican from Arkansas -- I'm sorry, from Nebraska, and he had been worried about criminal groups infiltrating business

organizations. He had a statute that said business enterprise.

I was told by them -- and I might say, Your Honor, that the dynamics of the senate at this point are ranking republican and the ranking democrat were close politically, and our opposition was from Senator Kennedy and the ACLU. So a republican here and a democrat here. They, in fact, were close. The opposition came from senators on other committees.

I was instructed to meld those two bills. So what I did is I took the business off of enterprise in Senator Hruska's bill and I merged the word organization in the enterprise. And then it's defined in the statute. But it's terribly important to read the definition because it says enterprise includes. It doesn't say means. And that means what you see there is illustrative but not exhaustive. That's not my spin. That's exactly what the Supreme Court tells us in Boyle. In footnote 2 in Boyle, it says this is not exhaustive. It's any -- any -- and any is broad -- any enterprise.

Now what is an enterprise in this context? You have before you four paragraphs. Why did Monsanto get into this? They were down in terms of profits. There is another word for that. Sin begins from a vice, and the vice here is greed. Monsanto organized an informal organization of

entities and individuals. And they were ostensibly organized to develop COX-2 and then market it.

Participating in that group was of course BYU. They were central to it. What BYU didn't know was that Monsanto had two illicit purposes -- an ostensible legal purpose and two illicit purposes.

Now what my friend Mr. Hatch has done is conflate those two. Sometimes he's talking about the common purpose of the subgroup and sometimes he's talking about the common purpose of the full group.

The full group -- and we have in the chart, in the complaint, each person who entered into this association, what role he played, and whether he was culpable in any way. What you had here was a business organization, not formal, with a corporation, to develop this, and different people were brought into it to play a role in the sense of implementing the ostensible purpose.

Some of the people that were brought into it, and I'm referring now to the lawyers, were brought in to implement it. Point number two, violating -- and now paragraph 193, violating obstruction of justice to protect its profits from legal challenge.

Monsanto, Pfizer had been all through this before. They know that if they put a drug out there, it's not enough to develop it. They have to protect it. Now if they

protect it with normal litigation -- this is a discovery dispute, they hide documents.

I can tell you -- I was an Assistant United States Attorney -- if I had been running a grand jury and the people producing materials to me had done what these lawyers did in this case, they would have been indicted in a minute. And the sanction that was imposed on them could easily have been an obstruction of justice, a crime right then and there.

What happens to the pattern? The pattern begins with fraud and concealment, and then it goes into litigation strategy. It's all part of the subsidiary purpose of Monsanto, Pfizer while the ostensible legal purpose continues on top.

If you will look on the chart that I've given you, and now it does not require -- the second quote from Energy Owners Commission v. United States Energy Management, the statute, that's RICO, does not prohibit plaintiff from including themselves in a legitimate, albeit infiltrated, enterprise. A legitimate enterprise. The development of the product, the marketing of the product, that's legitimate. But what happened is that organization was infiltrated with some of the people who founded it. Its purpose was ostensibly lawful but, in fact, it was unlawful for those who participated in the subpart.

Let me give you another example. There is a case in the Eleventh Circuit called Beasley. It deals with a black religion. And there was a subgroup within -- and the religion is the enterprise, all the people who participated in it. There was a subgroup in it that believed that one of the functions of the religion was to kill white people, and they went out and did it. Not every member of that religion was part and parcel of the killings. They were the subgroup. No problem with common purpose. The common purpose was the religion. Illegal twisting of the enterprise is what the black people, the white killers did.

That's what happened here. It was a legitimate marketing enterprise. At different points in time they would bring in different people who would perform different services, people who would do public relations, people who put articles out to people, know who we are.

Let me have number nine.

This is from Boyle in which it explains what's involved. An association-in-fact enterprise must have at least three structural features: A purpose, relationships, and longevity. A group of persons associated together for a common purpose. It doesn't mean that every person who plays a role in the enterprise has to be part of the common purpose. They can be innocent agents.

THE COURT: Mr. Hatch argued that your greatest

weakness is perhaps the failure to show relationship among those associated, that the only relationship was in common with Monsanto, but they had no relationship with each other. Is that a good argument?

MR. BLAKEY: No. It would be sufficient if you had central people and they worked in from a wheel. Imagine a wheel. Is it necessary for them to have a rim? The answer is no. A conspiracy is not -- I'm sorry, an enterprise is not a conspiracy. It's an association. If you are associated with a hub, you are associated with each of the spokes through the hub. That's precisely what happened here.

If you say that this is not an enterprise within RICO, you are saying it is not a business structure, a business association. Business associations are as multiple as the idea of a man's in the head. It was drafted in this form so it would capture no matter what you thought up as long as it was, in fact, an association. And if it was a wholly illicit association, everybody would have to have the common illicit objective. But if it's a licit association -- and we cited in here the Supreme Court's decision in Turkette that says enterprises are both licit and illicit.

What you have before you is an illicit organization that was perverted. It is, in a sense, in the

center of what Senator Hruska was worried about. Criminals take over a legitimate organization, develop this product, market this product, waffle. Develop this product with stolen property, market this property through fraud, and they have to do it through fraud because the day it comes out that Dr. Simmons really invented this, he gets a modification of the patent, it's not worth anything to them to have it. It's not gold. It's only as they can patent it and sell it.

Now the other points in here are minor. They say this is not a pattern on two grounds. One is they are doing it right now. They are making about a billion and a half a year. It's ongoing. That's as much of a pattern as I can imagine, from 1991 to today. That's like 20 years.

It's also the regular way of doing business, apparently, for these people to market drugs fraudulently. They did it with Celebrex. They did it with Bextra. They did it with Neurontin. Either of those routes gets you a pattern.

As to predicate acts, it says mail fraud, wire fraud. I have given you the definition of mail fraud, wire fraud. I've given you some of our allegations, but not all. And then the statute puts obstruction of justice in the predicate acts. We didn't dream this up. The fact that discovery abuses can be obstruction of justice doesn't deny

that they do it. And what they did in this case was done maliciously, intentionally, and to the tune of a court order. That's called obstruction of justice.

On the last point about injury, the statute says property. It doesn't say what kind of property. If you want to understand what kind of property, look down into the predicate offenses. They are crimes protecting property by criminal sanctions. Through RICO, it's protected by civil sanctions. It would be weird, absurd if you would have a scope of the predicate offenses be larger than the remedy granted in RICO when it is pretty liberally construed.

I have given you the major definitions for the meaning of property in mail fraud and wire fraud. And this notion of concrete injury is a discredited notion from the Ninth Circuit that's already been overruled by them.

In sum, Your Honor, when I came into this, I was asked to look at it and see what it was. I am a professor of law. I spend most of my time teaching and about 15 percent of my time consulting. Of that 15 percent, I spend 90 percent of my time telling people not to bring RICOs. It gives the statute a bad name. I come in with a presumption that it's no good. And the deeper I got into this, the more I saw this was precisely what the statute was developed for. This is Senator Hruska's promise of protecting legitimate business organizations from being

subverted for criminal purposes.

Theft, that's classic. Lying, that's classic. And they are making big bucks out of it. They didn't go in with a gun or a knife. They went in with a pen. And if you remember that line from The Godfather, you can steal more money with a pen than you can with a gun. That's precisely what they're proving in this case. Thank you.

THE COURT: Mr. Blakey, I do have to ask you this. Mr. Hatch argued and he used the chart to indicate that if the Court accepts the stated purpose as broadly as your client has, that there is no end to the number of entities or individuals that may be included in that enterprise. I can't believe that that was something intended by the senators who wrote the RICO statute. How do you respond to that? You've got about two more minutes.

MR. BLAKEY: My answer to that is this is on a continuum and he's taking it to the absurd end. We're not there. Here's the business purpose, develop this product. Who's necessary for the developer here? The hub now is going to be Monsanto, ultimately Pfizer, their doctors. We bring in other people to develop it at various points. And then finally we start marketing it. Who do we have to deal with to market? The FDA, et cetera, et cetera.

Now as you bring in other people to do this, every drugstore that sold this, are they part of the association

in fact? I think that's where it goes too far. The real question is not whether it could go too far. It's whether we went too far in this framing of it. And that's what we've pled, and we've pled it in detail. Look at that chart, it's on page 46 of our complaint, each person, when he came in, what he did, the role he played, and whether he was licit. That answers their issue about relationship. Who created their relationship? Monsanto, Pfizer, the hub.

THE COURT: But they would have been the hub of an even larger group as well.

MR. BLAKEY: If you wanted to stretch it out, it is true. Let me give you another example.

Where do you get heroin? It's not made in this country. It's made in the mid east. All the people who farm it, and by this I mean Afghanistan, they sell it forward. It has to be taken from poppies to heroin. That's done typically in Marseille. Then it's brought to the United States, in New York, and from there it fans out all over the United States. In terms of what they call in criminal law a chain conspiracy, those farmers in Afghanistan and those drug dealers on the streets of Los Angeles are part of the whole distribution chain and they are, in fact, co-conspirators. That's what the law of conspiracy now says.

Do you draft anything that broad? No. You can

only get about 20 some odd people in the courtroom. So you limit the size of the conspiracy to about what you can get in the courtroom. But the theory permits that broader thing.

What we've done here is a lot less than that. Everybody in there has a purpose. They performed a purpose for a period of time. When the purpose was gone, they fell out. The core root remains the same. They do it as a wheel. You don't need a hub. We do have -- we don't need a rim. We do need a hub. And each of the others go out. Could others be added in here? With increasingly less -- what shall we call it -- sensibility. The real issue is not how far does it go, it's whether we went far enough appropriately. That's a question of proof. This is a motion to dismiss. It's not a motion for a summary judgment.

Your Honor, I would be remiss if I didn't thank you for the opportunity to appear before you.

THE COURT: Thank you.

MR. BLAKEY: Thank you very much.

THE COURT: You've got your time divided up?

MR. HATCH: I'm going to try and take 30 seconds and give the remainder --

MR. DOUGHERTY: When was the last time attorneys stuck to 30 seconds?

MR. HATCH: I've been here too much. I see you shaking your head. I am actually going to try.

I want to go directly to this hub and spoke concept. I cited a case that said parallel acts aren't enough. You can't just go back to the acts, say, in this case, of Monsanto. The problem is that's just wrong. I cited to you one case in my main argument. Third Circuit, In re Insurance Brokerage Antitrust Litigation, 618 F.3d 300, specifically says that you have to show the components functioning as a unit, that there has to be something that ties together the various defendants.

THE COURT: Is this another case you didn't cite in your memorandum?

MR. HATCH: Well, but it also cites -- it specifically cites and says --

THE COURT: I'm asking you because I need to know.

MR. HATCH: I don't know.

THE COURT: I don't remember this case.

MR. HATCH: Then it probably was not.

THE COURT: Will you make certain that a copy of the case is given to --

MR. HATCH: I will, absolutely, Your Honor.

It states specifically, in citing a --

THE COURT: The case will be read. You don't need to cite it.

MR. HATCH: Your Honor, I just need to cite this one cite. The cite states, a rimless hub and spoke -- a rimless hub and spoke configuration would not satisfy the relationships prong of the Supreme Court's Boyle structure requirement.

So Mr. Blakey is just wrong. The problem is -- and I have the greatest most respect for Professor Blakey, but he has kind of made a career in going around the country and arguing for -- like he has here. It's hard to tell where he's arguing and hard to tell where he's testifying what he thinks the act should be. He's gone around the country doing that.

I put together a list of cases that Professor Blakey has been involved in where he's tried to expand RICO, and the courts have routinely rejected it, and sometimes in pretty harsh language. Your Honor, I would put to you that, you know, his purpose in testifying here to try and get you to broaden RICO really isn't what the law is.

MR. BLAKEY: Could we have a copy? That might be appropriate.

MR. HATCH: Absolutely.

MR. DOUGHERTY: Your Honor, we'll make sure we get those cases to you. I saw that Mr. Beus cited some cases that were not included in his brief.

MR. BEUS: That's not true.

THE COURT: I'm not using it to criticize. I'm just trying to figure out why I'm hearing for the first time something that was not in what I read.

MR. DOUGHERTY: No problem.

Your Honor, just a couple of things quickly on the statute of limitations issue. You know, I understand in the face of a statute of limitations issue that the plaintiffs would try and narrow their claims, but we have up on the screen, on the screen in front of you, how they have defined the project. It is precisely as I said to you when I stood up here. This is the case they have been litigating and that we have been defending for almost four years. So to stand up here and say the project is now something else, it's much narrower, and therefore all the information that Mr. Beus didn't address that we pointed out in our argument is not relevant, is incredibly unfair, and I don't think the law permits them to do it.

In an effort to prove futility or to prove inquiry, and it's unclear exactly what the argument was, you saw this board right here. Mr. Beus said again and again and again, or words to that effect, they attempted to make inquiry again, again and again, letter after letter after letter. Let's look at it.

All of this is the termination correspondence. This is not inquiry. This is no attempt to make an inquiry.

This is the parties agreeing to terminate the agreement. He's not asking anywhere in here what are you up to, what are you using, what are you doing with the project. This is completely misleading, Your Honor. This is the termination correspondence. Watch what happens here.

The next thing you have is March '97. They have something here that kind of -- snuck that in, '92 to '97, face-to-face with Dr. Haymore. Dr. Haymore wasn't working on the project. Dr. Haymore wasn't their point of contact at Monsanto. He's just some employee. And they are claiming that that's the inquiry and that they were misled as a result of that? There is no inquiry. There was no communication. While this thing is going through marketing and going through all of the development process, they say nothing.

Mr. Beus said, well, we didn't know. We might have known that they were using murine COX, but we didn't know that it was our stuff. But what has the plaintiff alleged in this case? They have alleged that the trade secrets were such that we actually can't have a COX-2 program without using their stuff. So when he sees the references to murine COX in all of our publications, did he pick up the phone and say is that mine? No, not once.

The law doesn't require the plaintiff to know every fact, just enough to put them on notice. But, again,

what the plaintiffs are doing here, Your Honor, is they are focusing on the wrong party. They are trying to focus on us and not what they knew.

Rick, go to the last slide, please.

Again, Your Honor, we would -- the Colosimo case is I think excellent on the question of fraudulent concealment and I think applied in this case it shows that plaintiffs are not entitled to the benefit and haven't proven it, because it's their burden to prove.

The articles, on the left-hand side of the screen, Your Honor, this is what Dr. Simmons said about our articles when he was writing his grants contemporaneously with the unfolding of these events, talking about COX-2 as being reported by pharmaceutical companies, citing one of our articles. Extensive drug screening has led to the identification of multiple COX-2 selective inhibitors. Now, in the face of the motion for summary judgment, Dr. Simmons, on the right, says, these articles do not specifically relate to Monsanto's work in searching for a COX-2 selective inhibitor.

THE COURT: All right, Mr. Dougherty. I have got to cut you off.

MR. DOUGHERTY: Thank you, Your Honor.

THE COURT: Thank you.

Counsel, I am aware you all had a bunch of slides

that you would have loved to have presented to the Court. Just make copies -- or make copies available to the law clerk and we will rely upon them to the extent we think they are relevant.

I appreciate your willingness to abide by the Court's restrictions here, but, as I said at the outset, it's not as if you have not briefed this matter. We have stacks and stacks of memorandum and exhibits. And so this was very helpful. I appreciate all of you and your arguments. The Court will take the issues under advisement and will issue a ruling as soon as it can.

MR. DOUGHERTY: Your Honor, we thank you very much for your time.

MR. BEUS: Thank you, Your Honor.

MR. BLAKEY: Your Honor, may I have a point of personal privilege?

I didn't see this before today. I would like to make a motion to strike it from the record. I didn't have a chance to see it and I didn't have a chance to comment on it.

THE COURT: My guess is I'm not going to consider it, but I'm not going to make an official ruling. You are correct that it was submitted to the Court late and, frankly, its relevance is de minimis because it's not your credibility. You are not being offered as an expert witness

and I'm not making a Daubert determination here.

MR. BLAKEY: Thank you, Your Honor.

(Whereupon, the proceeding was concluded.)

C E R T I F I C A T E

I hereby certify that the foregoing matter is transcribed from the stenographic notes taken by me and is a true and accurate transcription of the same.

PATTI WALKER, CSR-RPR-CP DATED:
Official Court Reporter
350 South Main Street, #146
Salt Lake City, Utah 84101
801-364-5440